IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-840

CHARLES J. ROWE, et al.,

Petitioners,

vs.

THOMAS DURSO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Your petitioners, Charles Rowe, Allyn Sielaff, David Brierton, Edward Jordan and Joseph Barda, all present or former administrators employed with the Illinois Department of Corrections, respectfully pray that a Writ of Certiorari issue to review the judgment of the Federal Court of Appeals for the Seventh Circuit entered on July 19, 1978 and its denial of a rehearing on August 24, 1978.

OPINIONS BELOW

The opinion of the Federal District Court for the Northern District of Illinois dismissing respondent Thomas Durso's complaint was decided on February 7, 1977, and is reported at 430 F. 249. The opinion of the Federal Court of Appeals for the Seventh Circuit reversing and remanding the order of dismissal of the District Court was decided on July 19, 1978, but is not yet cited in the appropriate Federal Reporter. Petitioner's petition for rehearing was denied on August 24, 1978. In accordance with Rule 19 of the Supreme Court of the United States, both opinions and the order denying a rehearing appear in an appendix to the instant petition.

JURISDICTION OF THIS COURT

The opinion of the Court of Appeals was filed on July 19, 1978, and petitioner's petition for a rehearing was denied August 24, 1978. The jurisdiction of the Supreme Court of the United States to hear the instant case is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

Whether the expectation of a state prisoner assigned to a minimum security work release center that he shall not be transferred to a more restrictive penal institution save for misconduct is insufficient to invoke the

application of the Due Process Clause when said expectation is derived solely from administrative practice and is unsupported by state law.

Whether a state correctional practice affording greater procedural protection to prison inmates who are transferred from a work release center to a more restrictive facility due to misconduct than is granted to work release inmates subjected to transfers on non-disciplinary grounds comports with the requirements of the Equal Protection Clause.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment XIV:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Ill. Rev. Stat., (1973), Ch. 38, Section 1003-6-3 (c):

> "The Department shall prescribe rules and regulations for revoking good time during imprisonment or release on parole or mandatory release under supervision."

Ill. Rev. Stat., (1973), Ch. 38, Section 1003-13-1:

> "The Department shall establish and maintain work and day release programs and facilities for persons committed to the Department and not placed on parole."

STATEMENT OF THE CASE

Respondent Thomas Durso, formerly a police officer and presently an inmate at Stateville Correctional Center, a maximum security institution within the Illinois Department of Corrections System, brought the instant action on October 8, 1976 pursuant to 42 U.S.C. 1983 of the Civil Rights Act. In his complaint, respondent prayed for monetary, declaratory and injunctive relief. (App. 3a, 13a) The basis of respondent's claim for relief arises out of circumstances occurring during his commitment to the Illinois Department of Corrections, a commitment arising from his conviction for murder and the subsequent entry of a sentence of 100 to 150 years.

In his complaint, respondent contended that on August 15, 1974, the Illinois Department of Corrections transferred him to Joliet Work Release Center, a facility which imposed fewer restrictions on inmate movement than Stateville and allowed participation in some educational and work programs located outside of the Center. Within one week of his transfer to Joliet, a strong negative reaction to respondent's assignment to a work release center was expressed in the Chicago Tribune and by the State's Attorney's Office of Cook County. (App. 2a) Respondent contended in his complaint that approximately one week subsequent to the adverse public response to his assignment to Joliet, petitioners Sielaff and Brierton admonished respondent that his removal from the facility could become necessary due to community pressure. (App. 2a)

Respondent asserted in his complaint that in October, 1974, he was charged with a violation of Department rules regarding visitation privileges, but was formally exonerated of any misbehavior. (App. 2a)

Although respondent was returned to Stateville prior to his exoneration and continued to remain at that institution, he was assured that he would be transferred back to a work release program at Carbondale, Illinois. (App. 2a)

In January, 1975, respondent contends he was advised by petitioner Sielaff that the Illinois Department of Corrections had decided to cancel his planned recommitment to a work release center and that other privileges he had been permitted to retain pursuant to his initial work release status were terminated. (App. 2a-3a)

After filing a grievance with the Department, he was informed that his continued placement in a work release center was neither in the work release program's or his own interest. (App. 3a)

Following the foregoing events, respondent filed his complaint in which he alleged that the termination of his work release assignment was violative of procedural due process (Count I), a deprivation of certain pendent state statutory provisions (Count II) and a denial of equal protection of the law. (Count III) (App. 3a, 13a)

On February 7, 1977, the District Court for the Northern District of Illinois, the Honorable Edwin A. Robson, presiding, granted petitioners' motion to dismiss all three counts of the complaint. (See Appendix B.)

Following an appeal, the Federal Court of Appeals for the Seventh Circuit reversed the District Court opinion in its entirety. (See Appendix A.) The opinion of the

Court of Appeals was predicated on its determination that respondent's allegation that the administrative practice of the Department of Corrections was to only invoke a work release status upon the occurrence of misconduct, and that the failure to adhere to said practice as to respondent raised a procedural due process claim sufficient to withstand dismissal. (App. 8a) Further, the Court of Appeals determined that the face of the record did not disclose any rational basis for treating respondent in a disparate manner from other work release inmates who were afforded procedural guarantees prior to the termination of their assignment. (App. 10a)

Following a denial of a petition for rehearing, the instant petition was filed so as to obtain this Court's review of the foregoing opinion of the Federal Court of Appeals. (See Appendix C) The petition is premised on the petitioners' assertion that a conflict exists between the Court of Appeals opinion and that of prior and controlling decisions of this Court.

REASONS FOR GRANTING THE WRIT

I.

THE EXPECTATION OF A STATE PRISONER ASSIGNED TO A MINIMUM SECURITY WORK RELEASE CENTER THAT HE SHALL NOT BE TRANSFERRED TO A MORE RESTRICTIVE PENAL INSTITUTION SAVE FOR MISCONDUCT IS INSUFFICIENT TO INVOKE THE APPLICATION OF THE DUE PROCESS CLAUSE WHEN SAID EXPECTATION IS DERIVED SOLELY FROM ADMINISTRATIVE PRACTICE AND IS UNSUPPORTED BY STATE LAW.

Central to determining the merits of the instant petition is an examination of the recent decisions of the United States Supreme Court pertaining to the constitutional implications, if any, arising from the transfer of an inmate within a state correctional system from one correctional facility to another governed by the same jurisdiction, but with a more restrictive atmosphere.

In *Meachum v. Fano*, 427 U.S. 215 (1976), the Court rejected the proposition that a transfer of an inmate from a less restrictive facility to a more security-prone institution infringed on any liberty interest encompassed by the Due Process Clause. As noted by the Court in *Meachum*:

> "That life in one prison is much more disagreeable than in another does not in itself signify that a Fourteenth Amendment liberty interest is implicated when a prisoner is transferred to the institution with the more severe rules." *Id.*, p. 225.

The Court in *Meachum* distinguished its prior holding in *Wolff v. McDonnell*, 418 U.S. 539 (1974) by stressing that in *Wolff* revocation of good conduct credit was subject to due process guarantees since applicable Nevada law conditioned revocation on the occurrence of

misbehavior. In contrast, applicable law in *Meachum* was that of the Commonwealth of Massachusetts; a sovereign which did not limit the basis for transferring its prisoners to that of misconduct.

In the companion case of *Montayne v. Haymes*, 96 S. Ct. 2543 (1976), the Court extended *Meachum* to disciplinary-motivated transfers by holding that if the appropriate correctional officials were not prohibited from transferring an inmate on non-disciplinary grounds the Due Process Clause was not activated merely by the decision to effectuate the removal of a prisoner from a particular facility due to misconduct.

Nor does a disparity in privileges afforded at the sending and receiving correctional facility trigger any due process considerations. In *Meachum*, this Court held that a transfer from a less restrictive facility to a more onerous institution, even when adverse consequences for the affected prisoner with respect to rehabilitative programs was an incidental occurrence, did not dilute any cognizable liberty interest encompassed by the Due Process Clause and is without constitutional significance. See *Moody v. Daggett*, 429 U.S. 78 (1976).

The principles to be derived from the foregoing cited case authorities of this Court are clear. A prisoner incurs no impairment of a liberty interest subject to the protection of the Due Process Clause when he is transferred from one facility to another more severe in character unless the expectation of remaining at the less restrictive facility is grounded in applicable state law. If state law does not restrict the basis for transferring an inmate to that of misbehavior, any transfer, even if motivated by disciplinary factors, is purely an administrative decision unfettered by any necessity to observe procedural due process guarantees.

In the instant case, the opinion rendered by the Federal Court of Appeals for the Seventh Circuit is in direct conflict with the above standards enunciated by this Court, thereby rendering the granting of petitioners' request for a review by means of a writ of certiorari particularly appropriate. In its opinion, the Court of Appeals concurred with the petitioners' contention that Illinois law did not impose any misconduct-related restriction on the discretion of the petitioners to transfer prisoners, such as respondent, assigned to work release centers to more security designed facilities. (App. 7a) Thus, the applicable state law of Illinois in the instant case did not establish an exception to the general standard articulated in *Meachum* and *Montayne* that transfers of prisoners between different institutions of varying restrictions could be effectuated without invoking due process considerations. Since a work release center is a correctional facility administered by the Illinois Department of Corrections to house inmates committed to the Department, the transfer of respondent from Joliet Work Release Center to Stateville Correctional Center is precisely the type of administrative action which *Meachum* recognizes as not of constitutional import. (See Ill. Rev. Stat. (1973), Ch. 38, Sec. 1003-13-1.)

Although conceding that Illinois law did not create for respondent a sufficient "liberty" interest to remain on work release assignment, the Court of Appeals held that the alleged prior customary administrative practice of the Illinois Department of Corrections to only terminate an inmate's work release status due to misconduct was of sufficient magnitude to warrant the operation of the Due Process Clause. In so holding, the Court of Appeals construed *Meachum* as recognizing state law and practice as alternative grounds for creating a constitutionally cognizable interest.

Petitioners submit a perusal of the *Meachum* opinion reveals an explicit rejection by this Court of the holding of the Court of Appeals that a customary state correctional practice to refrain from transferring inmates from relatively less restrictive facilities unless necessitated by misbehavior was sufficient *per se* to trigger due process protections.

> "That an inmate's conduct, in general or in specific instances, may often be a major factor in the decision of prison officials to transfer him is to be expected unless it be assumed that transfers are mindless events. A prisoner's past and anticipated future behavior will very likely be taken into account in selecting a prison in which he will be initially incarcerated or to which he will be transferred to best serve the State's penological goals.
>
> A prisoner's behavior may precipitate a transfer; and absent such behavior, perhaps transfer would not take place at all. But, as we have said, Massachusetts prison officials have the discretion to transfer prisoners for any number of reasons. Their discretion is not limited to instances of serious misconduct. As we understand it no legal interest or right of these respondents under Massachusetts law would have been violated by their transfer whether or not their misconduct had been proved in accordance with procedures that might be required by the Due Process Clause in other circumstances. Whatever expectation the prisoner may have in remaining at a particular prison so long as he behaves himself, it is too ephemeral and insubstantial to trigger procedural due process protections as long as prison officials have discretion to transfer him for whatever reason or for no reason at all. *Id.*, p. 228.

The Court of Appeals' reliance on *Tracy v. Salamack*, 572 F. 2d 393 (2d Cir. 1978) to establish administrative practices *per se* as a sufficient basis for triggering due process guarantees is misplaced. In *Tracy, supra*, at p. 395 n.9, the Federal Court of Appeals for the Second Circuit distinguished *Meachum* upon the basis that the governing state *law* limited the discretion of correctional officials to transfer inmates, thereby creating a cognizable liberty interest. The Court in *Tracy* noted that in *Meachum*, applicable law imposed no restrictions on transfers. Similarly, in the instant case Illinois law, as recognized by the Court of Appeals, established no restrictions on the transfer of inmates from work release facilities to more security-conscious institutions.

In view of the Court of Appeals' recognition in its opinion in the instant case that, as with Massachusetts law in *Meachum*, Illinois law creates no expectation of remaining at a work release facility in the absence of misconduct, the purported Department of Corrections practice of only revoking a work release status following misbehavior is an insufficient basis for requiring the invocation of the procedural safeguards of the Due Process Clause incident to the termination of an assignment to a work release facility.

Petitioners further submit that a decision by this Court to refrain from reviewing the decision of the Court of Appeals would ironically result in adverse consequences for prison rehabilitation. Assuming arguendo that the respondent's assertion in his complaint that the Illinois Department of Corrections usually terminates a work release status only when the basis for the transfer was the occurrence of misconduct, the existence of such a policy is indicative of a willingness to reward good behavior and to enhance an inmate's preparation for re-entry into society. To elevate the alleged foregoing policy of the Illinois Department of Corrections to that of constitutionally mandated procedures effectively places its correctional system under greater judicial

scrutiny than another state that has chosen a less rehabilitative approach to its inmate population.

It is manifest that a normal task in the operation of a prison system frequently includes transferring of inmates. Mandating procedural due process guarantees whenever an inmate is transferred to a more restrictive facility is to effectuate a further intrusion into basic state correctional decisions by the federal judiciary. As noted by this Court in *Meachum*,

> "Holding that arrangements like this case are within reach of the procedural protections of the Due Process Clause would place the Clause astride the day-to-day functioning of state prisons and involve the judiciary in issues and discretionary decisions that are not the business of federal judges . . . The Federal Courts do not sit to supervise state prisons, the administration of which is of acute interest to the States." *Id.*, pp. 228-229.

In light of the foregoing, petitioners submit that portion of opinion of the Federal Court of Appeals pertaining to a denial of due process sought to be reviewed here by Writ of Certiorari should be so reviewed, and having been so reviewed, set aside by this Court.

II.

A STATE CORRECTIONAL PRACTICE AFFORDING GREATER PROCEDURAL PROTECTION TO PRISON INMATES WHO ARE TRANSFERRED FROM A WORK RELEASE CENTER TO A MORE RESTRICTIVE FACILITY DUE TO MISCONDUCT THAN IS GRANTED TO WORK RELEASE INMATES SUBJECTED TO TRANSFERS ON NON-DISCIPLINARY GROUNDS COMPORTS WITH THE REQUIREMENTS OF THE EQUAL PROTECTION CLAUSE.

Distinctions between prisoners as to eligibility for various rehabilitative privileges need only be rationally based to withstand judicial scrutiny. See *McGinnis v. Royster*, 410 U.S. 263 (1973). The petitioners submit that

the inability of the Federal Court of Appeals to ascertain a rational distinction between inmates such as respondent who are transferred due to non-disciplinary considerations and those inmates who were transferred due to a disciplinary violation ignores the disparate and manifest impact of such transfers on constitutionally recognized "liberty" interests and rehabilitative programs.

The termination of a work release status if it is prompted by misconduct could yield more adverse consequences than the mere transfer to a more restrictive institution. The transferred inmate may also incur the loss of accumulated good time, the denial of parole and placement in a segregation unit as further punishment. At a minimum, his disciplinary record is affected in a negative manner. The constitutional significance of such decisions has been recognized by this Court as well as the Court of Appeals for this Circuit. See *Wolff v. McDonnell*, *supra*, and *United States ex rel. Richerson v. Wolff*, 525 F. 797 (7th Cir. 1975).

Due to the constitutional and rehabilitative implications that may result from the termination of an assignment to a work release facility when motivated by the conduct of the inmate, sound correctional policy is enhanced by requiring an adequate fact-finding process to determine whether the affected prisoner committed any disciplinary violation. Accordingly, providing such procedural guarantees as notice of charges, a hearing and written findings of the disciplinary committee supply some assurance that a decision to terminate a work release status will be predicated upon substantial evidence. See *Wolff*, *supra*, pp. 563-566.

In contradistinction to a transfer prompted by misbehavior, the removal of a prisoner to another facility

when grounded on non-disciplinary reasons results neither in the loss of any good conduct credit nor negatively impacts on the disciplinary record of the transferred prisoner. Under Illinois law, a prisoner may only forfeit good conduct credit if he commits a disciplinary infraction. See Ill. Rev. Stat., (1973), Ch. 38, Sec. 1003-6-3 (c). Thus, the adverse impact resulting from the transferring of a work release inmate to a more severe correctional facility is significantly modified when the basis for the transfer is non-disciplinary in nature.

An additional ground in support of the divergent approach of the petitioners with reference to disciplinary and non-disciplinary motivated transfers is that a fact-finding process, so essential to a correct result in disciplinary cases, is unnecessary when the termination of a work release assignment is premised upon policy considerations rather than any factual determination. Thus, in the case at bar, respondent's allegation that he was transferred due to public pressure raises no issue of fact as to conduct since his behavior while on work release status did not form the basis for his removal to Stateville Correctional Center. (See App. 2a, 8a, 18a)

Petitioners submit the foregoing differences between non-disciplinary and disciplinary transfers from the standpoint of resulting impact and the issues controlling, policy or factual, the transfer decision clearly demonstrate a rational basis for distinguishing between respondent and other work release inmates reassigned for misconduct. As previously noted, some of the distinguishing features derive from decisions of the Court with reference to such matters as revocation of good time and placement in segregation.

In the instant case, since respondent was not transferred for any disciplinary infraction he neither incurred any loss of good time nor did his reassignment to Stateville result in a segregation placement. Further, respondent does not allege any adverse impact on his parole prospects due to the transfer. (App. 5a, n.1, 15a-16a)

To require correctional administrators to provide the same procedural guarantees to inmates regardless of the motivation for transfer would discourage the granting of any procedural protections to transferred work release prisoners in view of the absence of any constitutional obligation on the part of correctional personnel incident to reassignment between different institutions. See *Meachum, supra.* Proscribing any distinction between disciplinary and non-disciplinary transfers as to available procedural guarantees impairs an administrator's ability to re-evaluate and promptly correct an initial assignment which upon reflection appears to be unwarranted. Further, by imposing procedural impediments as to situations similar to the case at bar, public support, an essential ingredient for community based correctional facilities such as work release centers, is endangered. (App. 18a, n.6)

In view of the foregoing, petitioners submit that portion of the opinion of the Court of Appeals pertaining to the denial of equal protection sought to be reviewed here by Writ of Certiorari should be so reviewed, and having been reviewed, set aside by this Court.

CONCLUSION

For the foregoing reasons, the petitioners request this Honorable Court to issue the Writ of Certiorari to review the judgment and opinion of the Federal Court of Appeals for the Seventh Circuit in its entirety.

Respectfully submitted,

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November 21, 1978

APPENDIX A

United States Court of Appeals

For the Seventh Circuit

No. 77-2123

THOMAS DURSO,

Plaintiff-Appellant,

v.

CHARLES ROWE, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 76 C 3765—**Edwin A. Robson**, *Judge.*

ARGUED FEBRUARY 17, 1978—DECIDED JULY 19, 1978

Before FAIRCHILD, *Chief Judge*, SWYGERT and PELL, *Circuit Judges.*

SWYGERT, *Circuit Judge.* The principal issue raised in this appeal is whether revocation of a prisoner's work-release status constitutes a deprivation of liberty protected by the Due Process Clause of the Fourteenth Amendment. The district court, in dismissing the complaint for failure to state a claim upon which relief can be granted, concluded that a state prisoner assigned to a work-release program does not have a constitutionally protected liberty interest in that status and therefore no notice or hearing was required before such status was revoked. For the reasons hereinafter developed, we hold that such a conclusion cannot be made as a matter of law and that the case must be remanded for an evidentiary hearing.

I

Plaintiff-appellant Thomas Durso was incarcerated at the Stateville Correctional Center in Joliet, Illinois following his conviction in 1964. Ten years later the Illinois Department of Corrections approved plaintiff's application for work-release status, and on August 15, 1974 he was transferred to the Joliet Work Release Center. As a participant in that program, plaintiff was authorized to attend classes outside the Center and to use recreational and other public facilities in the community.

Approximately one week after he arrived at the Center, plaintiff was granted a two-day home furlough. While on furlough it is alleged that the *Chicago Tribune* published an article which was highly critical of plaintiff and his participation in the work-release program. The Cook County State's Attorney also issued a public statement, quoted in the *Tribune* article, criticizing the transfer. Shortly thereafter prison officials informed plaintiff that he might have to be removed from the program because of the strong adverse community reaction to his placement. It is also alleged that his participation in the program was restricted following this incident.

On October 5, 1974 plaintiff had a visitor at the Center. Although he alleges that he was given permission to have a visitor, plaintiff was orally charged with violating the rules regarding visitation rights. Plaintiff was returned to the maximum security section at Stateville that evening.

Approximately two weeks later plaintiff received a formal written complaint charging him with a violation of the Center's rules. Plaintiff, by letter, denied that he had violated any of the posted regulations. On November 2, 1974 plaintiff was informed that he was exonerated of all charges against him. According to the allegations he was also told at this time that he would be transferred to the work-release program at Carbondale.

In January 1975 plaintiff was orally advised that his transfer to Carbondale had been cancelled and that his work-release status had been revoked. Thereafter he

initiated a grievance proceeding with the Department's Administrative Review Board. Although plaintiff was allowed to appear before the Board, he alleges that he was given no opportunity to present any evidence to show why his participation in the program should not have been terminated. The Board advised plaintiff that it was not in his best interest or the best interest of the work-release program for him to participate at that time. Plaintiff was not given any reasons for these conclusions.

On October 8, 1976 plaintiff filed this civil rights action pursuant to 42 U.S.C. § 1983 seeking monetary, declaratory, and injunctive relief against certain officials of the Illinois Department of Corrections. In the complaint plaintiff alleged that the termination of his work-release status deprived him of procedural due process (Count I), of certain state statutory rights (Count II), and of the equal protection of the laws (Count III).

Upon motion of the defendants, the district court dismissed the complaint for failure to state a claim and for lack of subject matter jurisdiction. *Durso v. Rowe*, 430 F. Supp. 49 (N.D. Ill. 1977). The court rejected the due process claim in Count I on the ground that revocation of work-release status is not a deprivation of any liberty interest embraced within the Due Process Clause. Count III was dismissed because the court deemed the allegations as too conclusory and because it deemed the mere inconsistency in the operation of prison management as insufficient to state a claim under the Equal Protection Clause. Having dismissed the two federal claims, the court then dismissed the pendent state claim in Count II.

II

In dismissing plaintiff's due process claim the district court concluded that *Meachum v. Fano*, 427 U.S. 215 (1976) was controlling and required a finding that revocation of plaintiff's work-release status did not infringe upon a constitutionally protected liberty interest. The Supreme Court in *Meachum* held that the transfer of state inmates to a prison where the living conditions were "substantially more burdensome" than at the previous prison did not *ipso facto* constitute a deprivation of liberty requiring due process. The Court

rejected the notion that "*any* grievous loss" or "*any* change in the conditions of confinement having a substantial adverse impact on the prisoner" is sufficient to activate the procedural safeguards of the Fourteenth Amendment. 427 U.S. at 224 (emphasis in original). The Court reiterated that the pivotal factor in determining whether an asserted interest is constitutionally protected is "the nature of the interest involved rather than its weight."

The Court distinguished the protection of liberty that the Due Process Clause protects "by its own force" and the protection of liberty following a criminal conviction. "[G]iven a valid conviction, the criminal defendant has been constitutionally deprived of his liberty to the extent that the State may confine him and subject him to the rules of its prison system. . . . The conviction has sufficiently extinguished the defendant's liberty interest to empower the State to confine him in *any* of its prisons." 427 U.S. at 224 (emphasis in original).

Because the prisoners in *Meachum* had been lawfully convicted, the Court resorted to "state law or practice" to determine whether the nature of the interest was embraced within the Due Process Clause. Specifically, the Court sought to ascertain whether the interprison transfers were conditioned "on proof of serious misconduct or the occurrence of other events." 427 U.S. at 216. The Court noted that the governing statute involved there left the decision to transfer to the discretion of prison officials; exercise of the discretion was not restricted in any way. That charges of serious misconduct often initiate and heavily influence the decision to transfer was deemed insufficient to base an expectation that good behavior would insulate a prisoner from transfer. Because the prisoner had no "right or justifiable expectation rooted in state law that he will not be transferred except for misbehavior or upon the occurrence of other events," *Montanye v. Haymes*, 427 U.S. 236, 242 (1976), the Court held that the interprison transfer did not implicate any constitutionally protected liberty interest.

Central to the holding in *Meachum* was the absence of any state-created right grounded in law or practice.[1] A right "grounded in law," missing in *Meachum*, was present in *Wolff v. McDonnell*, 418 U.S. 539 (1974). In that case a state statute not only provided a right to good time but also specified that it could be forfeited only for serious misconduct. Because the statute restricted the discretion of prison authorities, the Court held that the prisoner's interest was within the concept of liberty protected by the Due Process Clause.

The predicate necessary to trigger the Due Process Clause is not restricted to statutorily-created rights; it may also be found in official policies or practices. For example, in *Morrissey v. Brewer*, 408 U.S. 571 (1972), the governing statute gave prison officials unfettered discretion to revoke one's parole at any time or for any reason. Nonetheless the Court held that the termination of parole must be accompanied with procedural safeguards because a parolee relies on "an implicit promise that his parole will be revoked only if he fails to live up to the parole conditions."[2] 408 U.S. at 482.

Whether plaintiff's due process claim is cognizable therefore depends upon whether he has a right or justifiable expectation based on state law or practice which conditions the revocation of his work-release status upon proof of serious misconduct or the occurrence of

[1] Also central to the holding was that the summary transfer to another state institution was not followed by any disciplinary punishment, loss of good time or segregated confinement. 427 U.S. at 221-22. *See also Montanye v. Haymes*, 427 U.S. 236, 238 (1976). Where transfers are accompanied by such disciplinary action, due process applies. *See, e.g., Aikens v. Lash*, 547 F.2d 372 (7th Cir. 1976).

[2] The Supreme Court has recognized in other areas as well that constitutionally protected interests arise not only from statutorily-created rights but also from policy or custom. For example, in *Perry v. Sindermann*, 408 U.S. 593 (1972), the Supreme Court, in reversing the district court's award of summary judgment for the defendant, held that the nontenured teacher must be given the opportunity to prove "the existence of rules and understandings, promulgated and fostered by state officials, that may justify his legitimate claim of entitlement to continued employment absent 'sufficient cause.'" *Id.* at 602-03.

other specified events. If he does have such a right or expectation, the minimum procedures required by the Due Process Clause are necessary "to insure that the state-created right is not arbitrarily abrogated." *Wolff, supra*, 418 U.S. at 557.

Plaintiff first argues that his expectation that his work-release status would not be revoked unless he violated a rule or condition of the program is predicated on the Illinois Unified Code of Corrections, Ill. Rev. Stat. ch. 38, §§ 1001-1-1 *et seq.* Section 3-8-7(e) of the Code provides that certain procedures must be followed "[i]n disciplinary cases which may involve . . . a change in work, education, or other program assignment of more than 7 days duration . . . ."[3] Plaintiff correctly argues that revocation of one's work-release status and removal from a work-release center involves "a change in work . . . or other program assignment of more than 7 days duration." He further reads the statute as saying that this change in assignment may be imposed only as punishment for serious misconduct. With this we cannot agree.

[3] The section continues: "[T]he Director shall establish disciplinary procedures consistent with the following principles:

(1) Any person or persons who initiate a disciplinary charge against a person shall not determine the disposition of the charge. The Director may establish one or more disciplinary boards to hear and determine charges. To the extent possible, a person representing the counseling staff of the institution or facility shall participate in determining the disposition of the disciplinary case.

(2) Any committed person charged with a violation of Department rules of behavior shall be given notice of the charge including a statement of the misconduct alleged and of the rules this conduct is alleged to violate.

(3) Any person charged with a violation of rules is entitled to a hearing on that charge at which time he shall have an opportunity to appear before and address the person or persons deciding the charge.

(4) The person or persons determining the disposition of the charge may also summon to testify any witnesses or other persons with relevant knowledge of the incident. The person charged may be permitted to question any person so summoned.

(5) If the charge is sustained, the person charged is entitled to a written statement of the decision by the persons determining the disposition of the charge which shall include the basis for the decision and the disciplinary action, if any, to be imposed.

(6) A change in work, education, or other program assignment shall not be used for disciplinary purposes without prior review and approval under Section 3-8-3.

Plaintiff's interpretation is belied by the language of the statute itself. Subpart 6 to section 3-8-7(e) provides: "A change in work, education, or other program assignment shall not be used *for disciplinary purposes* without prior review and approval [by a grievance review board]." (Emphasis added.) The italicized portion of this provision would have been unnecessary if disciplinary purposes were the exclusive way in which one's program assignment could be changed.

More important, however, to construe this provision as prohibiting any program assignment change unless based upon a disciplinary violation is to curtail severely the ability of prison officials to exercise discretion in modifying program assignments of any significant duration. We do not believe this was the intent of the Illinois General Assembly in enacting this provision. A fair reading of the statute indicates it applies only when the change in program assignment is for disciplinary purposes; it does not prohibit a change in assignment for nondisciplinary reasons and does not limit the discretion of prison officials in making transfer decisions. Therefore plaintiff cannot base his right or expectation on state law.[4]

[4] Shortly after plaintiff's work-release status was revoked, the Illinois Department of Corrections pursuant to a statutory directive promulgated Administrative Regulation 1201. This regulation, which became effective July 1, 1975, sets up a detailed procedure for notice and a hearing prior to any decision to revoke one's work-release status. (Indeed, the procedures contained in this regulation include all of the procedures requested by plaintiff in this case.) The district court correctly held that the regulation does not control this case as the regulation did not become effective until after plaintiff's claim arose. *See* 430 F. Supp. at 51 n. 5. Nonetheless, the dismissal of the complaint deprived plaintiff from establishing that Regulation 1201 merely codified the Department's customary prior practice.

Plaintiff also argues that he is entitled to the protections of the Due Process Clause because his right is grounded in state practice. In his complaint plaintiff alleges that prison authorities customarily do not interfere with one's work-release status unless the participant violates some rule of the program or of his work-release contract. As this is an appeal from a motion to dismiss, this allegation must be taken as true. *Cruz v. Beto*, 404 U.S. 319, 322 (1972). Accordingly plaintiff must be given an opportunity to prove that as a matter of practice, prison officials did not revoke one's work-release status absent a rule violation. If the allegation is established,[5] the plaintiff has been denied his right to due process of law. *See Tracy v. Salamack*, 572 F.2d 393 (2d Cir. 1978).

We are compelled to note the strong similarities between parole and work-release. Indeed, many of the "core values of unqualified liberty" which the Supreme Court recognized that parolees enjoy, *see Morrissey, supra*, 408 U.S. at 482, are also present here. Like a parolee, a convict on work-release can pursue employment or education. He is eligible for leaves to renew contacts with his family. He may also be released to participate in unsupervised activities in the community, such as shopping, recreation, and visiting friends. A work-release participant's freedom is more limited than a parolee's. That difference, however, is one of degree only. The extent and nature of his freedom is qualitatively different from any "freedom" allowed at the prison. Moreover, revocation of that status entails a loss far more grievous than that sustained by one who is transferred from one prison to another.

[5] An Illinois Department of Correction Study of the first three years of its work-release program appears to support plaintiff's allegation that, absent a rule violation, a work-release participant is entitled to remain at the center. Of the thirty participants who were returned to prison from the program (the balance being released on parole or their sentences having expired), two committed new crimes, one was returned for an "uncooperative attitude," and twenty-seven were returned for rule violations, *e.g.*, unauthorized absence from the center or a job. K. Houlihan, *Adult Work Release Program* (Illinois Department of Corrections Publication, 1972).

III

In Count III plaintiff alleged that he was denied the right to the equal protection of the laws because defendants revoked his work-release status without affording him the same kind of hearing allegedly given to other participants of the program. In dismissing this count for failure to state a claim, the court held that the claim was conclusory and lacked a statement of sufficiently particularized facts. It further held that absent the presence of a suspect class, the mere inconsistency in the operation of prison management is not violative of the Equal Protection Clause. 430 F. Supp. at 52-53.

Under the Federal Rules of Civil Procedure, a plaintiff in a section 1983 action is only "required to set forth specific illegal misconduct and resultant harm in a way which will permit an informed ruling whether the wrong complained of is of federal cognizance." *Duncan v. Nelson*, 466 F.2d 939, 943 (7th Cir.), *cert. denied*, 409 U.S. 894 (1972). Count III of the complaint meets this standard. Plaintiff alleges that he was denied the same procedural safeguards given all other participants in the program before their work-release status was revoked. The only way plaintiff could have given more particularized facts would have been to identify those participants who were afforded a hearing. That is the job for discovery.[6]

The district court also held that plaintiff's complaint failed to state a claim because "the mere inconsistency in the operation of prison management, absent the application of suspect classifications, is not violative of the equal protection clause." 430 F. Supp. at 53. We believe the district court's view of a prisoner's right to bring an equal protection claim is too narrow. A state prisoner need not allege the presence of a suspect classification or the infringement of a fundamental right in order to state a claim under the Equal Protection Clause. The lack of a fundamental constitutional right or the absence of a suspect class merely affects the court's standard of review; it does not destroy the cause of ac-

[6] If the complaint was vague or lacked detail, defendants should have filed a motion for a more definite statement under Rule 12(e), not a motion to dismiss. *See* 2A J. MOORE, FEDERAL PRACTICE ¶12.08 (2d ed. 1974).

tion. "[I]n the absence of fundamental rights or a suspect classification, equal protection requires only that a classification which results in unequal treatment bear some rational relationship to a legitimate state purpose." *French v. Heyne*, 547 F.2d 994, 997 (7th Cir. 1976). And as we noted there, "prisoner claims do not form an exception to the general rule" that equal protection claims need not be based on the denial of a fundamental right or the involvement of a suspect class. 547 F.2d at 998. *See Nadeau v. Helgemoe*, 561 F.2d 411, 416 (1st Cir. 1977).

We agree that prison officials must be accorded latitude in the administration of prison affairs. *Cruz v. Beto*, 405 U.S. 319, 321 (1972). We also agree that a mere inconsistency in prison management may not in itself constitute a cognizable equal protection claim. *Briscoe v. Kusper*, 435 F.2d 1046, 1052 (7th Cir. 1970). But plaintiff's allegations go further than merely to assert that he was the victim of an erroneous decision; he claims that defendants purposefully denied him a hearing before terminating his work-release status even though hearings were customarily afforded to other inmates similarly situated.

The defendants may be able to establish the rationality of treating plaintiff differently. But a court ought not dismiss an equal protection claim on the basis of reasons unrevealed to the court. *Cruz v. Beto*, 405 U.S. 319, 321 (1972). The state must come forward and identify the legitimate state interest being furthered. *Gault v. Garrison*, 569 F.2d 993, 996 (7th Cir. 1977). As we again noted in *French*:

> In the absence of an articulated purpose for the distinctions drawn here, we cannot indulge in supplying an imaginary purpose or basis for the classification . . . and thereby preclude plaintiffs from showing that such an "apparent" basis does not actually exist. . . . In this appeal, the question is not whether plaintiffs will ultimately succeed in proving their claim that the classification by defendants lacks a rational basis, but rather whether or not plaintiffs are entitled to present evidence in support of their claim.

547 F.2d at 999 (citations omitted).

IV

Because we hold that the district court erred in dismissing Counts I and III, it necessarily follows that the dismissal of Count II—the allegation that defendants violated Illinois law—must also be reversed. As the state and federal claims "derive from a common nucleus of operative fact," the district court has power to hear the pendent claim. *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966).

We make one final ruling. In *Hagans v. Lavine*, 415 U.S. 528, 546-47 (1974), the Supreme Court reiterated the rule that it is generally advisable to decide a pendent state claim before addressing a federal constitutional claim. The district court is therefore instructed to determine the reason for plaintiff's removal from the work-release program, *i.e.*, whether it was for disciplinary or non-disciplinary reasons. If the court finds that the purpose was disciplinary, then Ill. Rev. Stat. ch. 38, § 1003-8-7(e) and regulations promulgated thereunder require that defendants afford plaintiff a hearing. Such a finding would dispose of the case and render unnecessary a decision of the federal constitutional claims. If, however, the court finds that plaintiff was removed for non-disciplinary reasons, plaintiff is still entitled to establish that he had a right or justifiable expectation under state practice that his work-release status would not be revoked unless conditioned upon the occurrence of specified events.

The order dismissing the complaint is reversed and this cause is remanded for further proceedings consistent with this opinion.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

THOMAS DURSO,

Plaintiff,

v.

CHARLES ROWE, et al.,

Defendants.

No. 76 C 3765

MEMORANDUM AND ORDER

This cause if before the court on the motion[1] of defendants[2] Charles Rowe, Allyn R. Sielaff, David V. Brierton, Edward Jordan, and Joseph Barda to dismiss the complaint for failure to state a claim upon which relief can be granted and for lack of subject matter jurisdiction. For the reasons hereinafter stated, the motion shall be granted.

Plaintiff, Thomas Durso, is presently incarcerated at the Illinois State Penitentiary, Stateville Branch, Joliet,

[1] Actually, two sets of motions to dismiss have been filed, the first by defendants Sielaff and Rowe and the second by defendants Brierton, Jordan, and Barda. Defendants Sielaff and Rowe have joined in the latter motion. In light of the court's decision, it is unnecessary to reach the arguments raised by the former motion.

[2] The complaint was originally filed against the five named defendants and Bernard Carey, State's Attorney of Cook County. A motion to dismiss the complaint as to defendant Carey was granted by the court on November 29, 1976.

Illinois. Represented by counsel, he brings this civil rights action pursuant to 42 U.S.C. § 1983 and seeks monetary, declaratory, and injunctive relief. In support of his claim, plaintiff alleges in Count I that the conduct of defendants in removing him from a work release program without prior notice or a legally sufficient hearing violated his constitutional right to due process of law. In Count III, plaintiff asserts that he was deprived of equal protection of the law because the procedural rights denied him are believed to have been afforded to other work release inmates. Count II alleges that the revocation of plaintiff's work release status was not in accordance with Illinois law. Federal jurisdiction over Counts I and III is invoked pursuant to 28 U.S.C. § 1343(3) and 28 U.S.C. §§ 2201 and 2202. Federal jurisdiction with respect to Count II is asserted under the doctrine of pendent jurisdiction. *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966).

In support of their motion to dismiss Count I, the defendants argue, *inter alia*, that plaintiff was not deprived of a sufficient liberty interest to trigger procedural due process.[3] With respect to the equal protection allegations, defendants contend that they are too conclusory and vague to state a claim for relief; Moreover, defendants maintain that mere inconsistency in the operation of prison management absent application of such suspect classifications as race or national origin is not violative of equal protection as encompassed by the fourteenth amendment. Finally, defendants argue that since Counts I and II must be dismissed for failure to state a claim upon which relief can be granted, Count II should be dismissed for want of federal jurisdiction.[4]

[3] Defendants also argue that plaintiff's complaint should be dismissed because it would require the application of retroactive relief.

[4] In the alternative, defendants argue that plaintiff has failed to state a claim in Count II.

In his memorandum in opposition to the motion to dismiss, plaintiff argues that revocation of his work release status is a deprivation of liberty protected by the due process clause of the fourteenth amendment since work release termination may have an adverse impact on rehabilitation and future parole eligibility. He further contends that he has stated a cognizable equal protection claim and that the factual averments in the complaint are sufficiently specific. Finally, plaintiff argues that this court should exercise pendent jurisdiction over Count II of the complaint since the state law claim is closely related to the constitutional claim and derives from a common nucleus of operative facts.

The court must first decide whether the revocation of plaintiff's work release status is a deprivation of liberty protected by the due process clause of the fourteenth amendment. It concludes that it is not. In *Gauthreaux v. Sielaff*, No. 75 C 3198 (E.D. Ill., November 12, 1976), under similar facts, Judge Foreman recently held that a prisoner has no such protectible interest under the due process clause. While it is true that the late Judge Lynch held otherwise in *Witherspoon v. Sielaff*, No. 75 C 644 (N.D. Ill., January 19, 1976), the court finds *Gauthreaux v. Sielaff, supra*, a more persuasive authority on this issue, and in the light of recent United States Supreme Court decisions discussed *infra*, a more accurate reflection of the state of the law.

The Supreme Court has rejected the notion that every state action carrying adverse consequences for prison inmates automatically triggers due process rights. *Meachum v. Fano*, 44 U.S.L.W. 5053 (1976); *Montanye v. Haymes*, 44 U.S.L.W. 5051 (1976). As the court noted in *Montanye supra* at 5052-53, "[a]s long as the conditions or degree of confinement to which the prisoner is subjected are within the sentence imposed upon him and

are not otherwise violative of the Constitution, the Due Process Clause does not in itself subject an inmate's treatment by prison authorities to judicial oversight."

Plaintiff's attempt to distinguish *Meachum* and *Montanye* must fail. While it is true that these cases recognize that state-created rights may operate as a predicate for invoking the protection of the fourteenth amendment, no such predicate exists here.[5] Moreover, to hold that any substantial deprivation imposed by prison officials activates the procedural protections of the due process clause would unduly involve the judiciary in discretionary decisions traditionally within the province of prison authorities. *Meachum v. Fano, supra* at 5056-57.

Plaintiff's reliance on *Holmes v. United States Board of Parole*, 541 F.2d 1243 (7th Cir. 1976) is also misplaced. There it was held that due process was required prior to classifying a prisoner as a special offender. However, as defendants point out, classification of a prisoner as a special offender is a different matter than terminating work release status. Moreover, the court in *Holmes* found the necessary predicate not present here.

While plaintiff does not contend that his removal from work release resulted in a denial of parole, he does argue that termination of his work release status may have an adverse impact on his rehabilitation and future parole eligibility. He maintains that this constitutes a grievous loss and that due process is therefore required.

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[5] Plaintiff maintains that eligibility for and disqualification from work release are connected to statutory guidelines. Illinois law does provide that the Department of Corrections is to promulgate rules governing release status and that it may impose sanctions for violation of these rules. Ill. Rev. Stat. Ch. 38 § 1003-13-4. However, the regulations of the Department of Corrections governing work release revocation—as plaintiff concedes—became effective *after* plaintiff's alleged claim arose.

However, such possibilities are not enough to trigger due process. In *Meachum v. Fano, supra* at 5058 n. 8, the Supreme Court rejected the possible prejudice an inmate might incur in any future parole hearing as a basis for mandating due process guarantees. In *Montanye v. Haymes, supra* at 5052 n. 4, the Supreme Court reversed the Court of Appeals for the Second Circuit notwithstanding its partial reliance on the adverse impact on the possibility of parole or the potential interruption of rehabilitative programs. And in *Moody v. Daggett*, 45 U.S.L.W. 4017, 4020 n. 9 (1976), the United States Supreme Court recently reiterated its position that due process protections are not activated merely by prison officials' action carrying adverse consequences for inmates with respect to rehabilitative programs and prisoner classification.

The second question the court must decide is whether plaintiff has failed to state an equal protection claim under 42 U.S.C. § 1983. It is well settled that a claim is stated unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Of course, plaintiff's complaint is subject to greater scrutiny than a *pro se* complaint since plaintiff is represented by counsel. *See Haines v. Kerner*, 404 U.S. 519 (1972).

Plaintiff predicates his equal protection claim upon his belief that defendants revoked his work release status without affording him the same kind of hearing and finding of misconduct given to other participants in the program. The court concludes that plaintiff has failed to state a claim upon which relief can be granted. It is well established that particularized facts demonstrating a constitutional deprivation must be presented to sustain a cause of action under the Civil

Rights Act. *Adams v. Pate*, 445 F.2d 105 (7th Cir. 1971); *Bach v. Scott*, 357 F.Supp. 1125 (N.D. Ill. 1973). Conclusory allegations of discrimination are insufficient to establish a claim under 42 U.S.C. § 1983. *Carlisle v. Bensinger*, 355 F.Supp. 1359, 1362 (N.D. Ill. 1973); *Heckart v. Pate*, 52 F.R.D. 224 (N.D. Ill. 1971). Here there are no specific factual averments submitted by plaintiff in support of his broad allegations. As such, they are too conclusory to state a claim under the Civil Rights Act. *Heckart v. Pate, supra.*

Moreover, plaintiff has failed to state a claim because prison officials have wide discretion in prison matters and discipline. *Kelly v. Dowd*, 140 F.2d 81 (7th Cir.), *cert. denied*, 321 U.S. 783 (1944). There is no reasonable basis here for interference with state authority, even though plaintiff's claim is couched in the guise of a violation of his constitutional rights. *Walker v. Pate*, 356 F.2d 502 (7th Cir.), *cert. denied*, 384 U.S. 966 (1966); *Negrich v. Hohn*, 379 F.2d 213 (3d Cir. 1967). Federal courts may not inquire into matters in state penitentiaries except under exceptional circumstances not present here. *Walker v. Pate, supra* at 504; *United States ex rel. Miller v. Twomey*, 479 F.2d 701, 713 n. 25 (7th Cir. 1973), *cert. denied sub nom. Guitierrez v. Department of Public Safety*, 414 U.S. 1146 (1974).

Plaintiff also fails to state an equal protection claim because "the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation." *Oyler v. Boles*, 368 U.S. 448, 456 (1962). Likewise, the mere inconsistency in the operation of prison management, absent application of suspect classifications, is not violative of the equal protection clause. *See Joyner v. McClellan*, 396 F.Supp. 912, 916 (D. Md. 1975).

Plaintiff's reliance on *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) and *United States v. Falk*, 479 F.2d 616 (7th Cir. 1973) (*en banc*) is misplaced. In *Yick Wo*, enforcement of a San Francisco ordinance was primarily directed at persons of Chinese origin, a suspect classification. In *Falk*, the Court of Appeals for the Seventh Circuit reversed a conviction based upon draft evasion because the court determined that Falk's prosecution was motivated by his activities in opposition to the war in Vietnam and the draft; activities the court found protected by the fundamental guarantees of the first amendment. In the case at bar, plaintiff alleges that the termination of this work release status was motivated by adverse community reaction to the work release program, including pressure from the Cook County State's Attorney's office.[6] However, plaintiff does not allege that his work release status was terminated because of such constitutionally suspect classifications as race or national origin. Nor is there an averment that plaintiff's removal was predicated upon his prior exercise of a constitutionally protected right. In light of such failure, no cognizable equal protection claim is stated.[7]

[6] Defendants submit that prison administrators clearly have the right, and indeed an obligation, to consider the reaction of the general community and law-enforcement officials when assessing the level of supervision to be applied to particular inmates.

With respect to Count II, it must likewise be dismissed. Where there is no substantial federal question, it is inappropriate to retain jurisdiction under any claim of pendent jurisdiction. *United Mine Workers v. Gibbs*, *supra*.

For the reasons stated, it is therefore ordered that the defendant's motion to dismiss the complaint for failure to state a claim upon which relief can be granted and for lack of subject matter jurisdiction shall be, and the same is hereby, granted and the action is dismissed.

/s/ EDWIN A. ROBSON
SENIOR JUDGE

February 7, 1977

[7] After the close of the briefing schedule, plaintiff's attorney called the court's attention to *French v. Heyne*, No. 75-1883 (7th Cir., December 22, 1976). The court has reviewed the case and finds her reliance on it misplaced. Plaintiff has alleged that defendants arbitrarily denied him the same due process rights afforded other inmates before removing them from work release, and argues that such arbitrary discrimination in the application of administrative regulations or practices states a viable equal protection claim. However, it is well settled that the arbitrary misapplication of state laws or powers does not in itself constitute a violation of equal protection. *Briscoe v. Kusper*, 435 F.2d 1046, 1052 (7th Cir. 1970). Plaintiff has failed to allege any classification other than the consequences of the defendants' improper application of their powers. *Id.*

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

August 24, 1978.

Before

Hon. Thomas E. Fairchild, Chief Judge
Hon. Luther M. Swygert, Circuit Judge
Hon. Wilbur F. Pell, Jr., Circuit Judge

THOMAS DURSO,

Plaintiff-Appellant,

No. 77-2121 *v.*

CHARLES ROWE, Individually and as Acting Director of Illinois Department of Corrections, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 76-C-3765—**Edwin A. Robson**, *Judge*

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause by counsel for the defendants-appellees, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

Honorable Philip W. Tone, Circuit Judge, did not participate in the *in banc* consideration of this matter.